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MICHAEL RODAK,

Case No. 80-332

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

v.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of Amicus Curiae State of Oregon in Support of Petition for Writ of Certiorari

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Brief of the State of Oregon, Amicus Curiae, in Support of Petition

Amicus, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 6, 1980.

STATEMENT OF INTEREST

The United States District Court for the District of Oregon has recently held that conditions at the Oregon State Penitentiary, the Farm Annex, and the Oregon State Correctional Institution violate the Eighth Amendment. *West v. Atiyeh,* Civil No. 80-6014 (Opinion filed August 22, 1980). The District Court opinion relies upon *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) in support of its conclusion.

SUMMARY OF ARGUMENT

Notwithstanding the Sixth Circuit's conclusion that the District Court opinion in *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) does not hold double celling unconstitutional *per se,* the net effect of the opinion is to do just that because all of the "additional factors" relied on by the District Court in framing its conclusion that under the totality of the circumstances the conditions at the Southern Ohio Correctional Facility violate the Eighth Amendment are either necessarily entailed by double celling or are entailed by the condition of incarceration for a serious offense. A conflict in the circuits is therefore presented as to whether double celling is unconstitutional *per se.*

The increasing volume of lower federal court cases treating the issue of the interface of prison conditions with the Eighth Amendment have developed a confused and confusing welter of standards which bear little or no relation to the history and language of the Amendment and provide no guidelines against which local prison officials may measure local conditions and comply with constitutional requirements. This case presents an appropriate vehicle for setting standards.

If a modern, well run penitentiary like the facility at Lucasville violates the Eighth Amendment simply because it is over design capacity, the anomaly is

presented that nearly every correctional facility in this country is, for constitutional purposes, "unusual" within the meaning of the Eighth Amendment. Such a result is wholly inappropriate.

ARGUMENT

In *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) the court found that the conditions of confinement at the Southern Ohio Correctional Facility in Lucasville, Ohio, constituted cruel and unusual punishment in violation of the Eighth Amendment. 434 F. Supp., at 1020. The Court reached this conclusion notwithstanding its express findings of fact that food was adequate, staffing was acceptably proportionate, ventilation was adequate, medical and dental care were not unconstitutionally denied, violence was not increased due to double celling, and there was no factual support for allegations that visitation, plumbing, lighting, law library facilities, or school facilities were inadequate due to overcrowding. In addition to the fact that double celling was occurring, due to an inmate population 38% over design capacity, the District Court supported its conclusion that an Eighth Amendment violation existed with findings that there are not enough jobs to go around, double celling interferes with studying, and psychological and social worker staffs were numerically inadequate. The stated reasons for the finding that "overly and on

balance . . . the double celling at Lucasville is unconstitutional," 434 F. Supp., at 1020, all relate to either double celling *per se* or conditions that are necessarily entailed in incarceration for a serious offense. No other consequences of double celling are acknowledged as weighing in the calculus. 434 F. Supp., at 1020-21.

The Court's statement of the legal standards against which the facts are measured is modest and fairly traditional. The restraint of *Procunier v. Martinez,* 416 U.S. 396 (1973), is formulaically uttered;[1] evolving standards of decency are evoked, although the citation is to *Weems v. United States,* 217 U.S. 349 (1910), rather than *Trop v. Dulles,* 356 U.S. 86 (1958); the "shocking to the conscience" test appears, through the filter of *Holt v. Sarver,* 309 F. Supp. 362 (E. D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971), rather than

[1] "Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and indadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974).

by direct citation to *Rochin v. California,* 342 U.S. 165 (1952); and, finally, the standards are reiterated and modified in the "totality of the circumstances" test:

> "The question is constantly stated as one of ascertaining the 'totality of the circumstances' of the particular case and then inquiring into whether the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience." 434 F. Supp., at 1019.

On appeal, the Sixth Circuit did not hold that a *per se* approach to double celling was impermissible. Rather, it rejected the defendant's contention that the District Court had held that double celling was unconstitutional *per se.* The Court found that a totality of the circumstances approach had been applied, distinguished *Bell v. Wolfish,* 441 U.S. 520 (1979), and perfunctorily affirmed:

> "Upon consideration of the record on appeal together with the brief and oral arguments of counsel the court concludes that the findings of fact of the district court are not clearly erroneous, that its conclusions of law are permissible from the findings of fact and that the remedial provisions are a reasonable response to the violations which were found."

The Sixth Circuit's opinion embodies a curious standard of constitutional review for a case of this magnitude, but there are three more important issues presented in this litigation which should be addressed by this Court: a) Does the District Court opinion in

fact hold, despite language to the contrary, that double celling is *per se* a violation of the Eighth Amendment, and if so, was that holding proper; b) what is the appropriate standard for determining whether prison conditions violate the terms of the Eighth Amendment; and c) do the conditions at Lucasville constitute cruel and unusual punishment?

There is, as the petition for writ of certiorari notes, a conflict in the circuits as to whether double celling is unconstitutional *per se*. *Compare Johnson v. Levine,* 588 F.2d 1378 (4th Cir. 1978); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976), *with Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977), which cites *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); and *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974) in support of its apparent conclusion that overcrowding is *per se* unconstitutional.

The district court's opinion in *Chapman* purports to employ the "totality of the circumstances" test as the standard for its conclusion that the conditions at Lucasville are cruel and unusual. The conclusion is said to rest on five premises: i) The inmates are "long term", ii) the facility is 38% over design capacity, iii) the allocated living space per inmate, not counting bay and hallway areas, is 30-35 square feet; and various

manuals and cases conclude that only a greater area is minimally acceptable, iv) the prisoners must spend a substantial period of time in the cell, and v) double celling is not contemplated as a temporary phenomenon; it is, rather, a continuing problem. *Chapman v. Rhodes, supra,* 434 F. Supp. at 1020-21. These premises are all either necessary and self-evident concomitants of double celling or they are rather unremarkable indications that inmates are incarcerated for the commission of serious offenses. They are not, in any reasonable sense, factors distinct from double celling to be considered in analyzing the totality of the circumstances.

The fact that the inmates are "long term" merely connotes that the facility at Lucasville is a penitentiary, not a pretrial holding facility; the convicts are felons. It necessarily follows from the fact of double celling in this context that design capacity is exceeded. The excess of 38% over design capacity here is not an additional factor, it is merely a quantification of the extent of double celling. Similarly, the fact that the average double celled inmate has "something in the neighborhood of 30-35" square feet per man adds nothing to analysis. It is not an additional factor, but a simple division of the square footage of a single cell.[2]

[2]It should be noted that opinions are divided on the method of computing square footage in overcrowding cases. In *West v. Edwards,* 439 F. Supp. 722

(Continued on following page)

That the majority of double celled inmates spends 14 hours a day in their cells, 434 F. Supp., at 1013, connotes that the inmates are imprisoned. Their freedom of movement has been restricted. Absent a consideration of the quality of the area of confinement and the inmate's use of the time — much of it, presumably, spent sleeping — confinement in a cell cannot be an additional factor in the analysis.[3] The fact that double celling is a continuing problem does not add to or modify the fact of double celling. If the criteria identified by the Court are to count as "additional consequences" of the fact of double celling rather than an elaboration of that fact, then there can hardly be such a thing as double celling *per se.* A reasoned analysis of

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(D.S.C. 1977), a case involving triple celling, the Court computed the square footage per man by including bays and hallways, citing *Ambrose v. Malcolm,* 414 F. Supp. 485 (S.D.N.Y. 1976), in support of its method. *West v. Edwards* held that triple celling, absent other deleterious conditions, did not constitute a violation of the Eighth Amendment. The square footage computation method of determining whether an institution is unconstitutionally overcrowded is, of course, open to a wide range of objections. Most obviously, the method does not account for the fact that the available space for a single inmate in a cell is the square footage of the cell minus the mass of the other objects in the cell. And it does not factor the quality of the space.

[3]L. Orland, Justice, Punishment, Treatment: The Correctional Process 278 (1973) relates the following comparison by an inmate between conditions in "the hole" and conditions in a cell:

> "The second thing that was very important was that I carefully measured the length and width of the hole, and then when I got out I measured the length and the width of the cell by paces and they were exactly the same, but they were worlds apart and I was overwhelmed with how beautiful it is to be in a cell as opposed to being in the hole. The cell is really wonderful place to be, wonderful in contrast to the hole. And the luxuries that were heaped on me. I could see in front of me and I had a blanket and I had a mattress. All this incredible luxury."

the application of the Eighth Amendment in the context of double celling is not advanced by breaking out the necessary constituent elements of double celling and incarceration in general and describing them separately as if they were not contained in the initial description.

The District Court in *Chapman,* while holding that the totality of the circumstances shock the conscience, premises that conclusion almost entirely on the double celling condition and its necessary concomitants. The other identified deficiencies — numerically inadequate psychological and social work staff, some interference with study, and lack of jobs — are not of independent constitutional significance and may be fairly characterized as trivial. There is, therefore, a substantial argument that *Chapman* holds double celling to be unconstitutional *per se*; and an issue that divides the circuits is presented.

Even if this case does not properly pose the issue of whether double celling is *per se* unconstitutional, the facts, as developed in the District Court opinion, reflect a modern, well-organized penal institution coping more than adequately with the effects of a national trend resulting in higher prison populations. The Southern Ohio Correctional Facility, judging from the facts elucidated in the opinion, is an above average penal institution. If the decision in *Chapman* stands,

it strongly suggests the anamolous result that the majority of correctional institutions in this country must be termed "unusual" under the Eighth Amendment. Indeed, the litigation in the lower federal courts would indicate that those courts have already concluded that the majority of prisons are unusual. A recent survey demonstrates that,

> "The federal district courts have decided reported cases involving adult prisons (juvenile facilities were excluded from analysis) in 29 jurisdictions. These included ten states, thirteen counties, four cities, Puerty Rico and the Virgin Islands. There were 49 cases relating to these jurisdictions and in almost all of them, violations of the constitutional rights of prisoners were found." Fair, the Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions, 7 Am. J. Crim. Law 119, 124 (1979).

Tucker, The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, 7 B.C. Env. Aff. L. Rev. 665 (1979), identifies 29 federal district court cases in which major prison reform was ordered and 25 cases in which major jail reform was ordered. *Id.,* at 679-680, fn 97-98. There are very few federal cases which hold that a given penal institution does not have conditions which violate the Eighth Amendment. These results are largely attributable to the ill-defined, subjective nature of the tests being employed to determine whether conditions are cruel and unusual coupled with the privileged economic and

social backgrounds of the individuals applying those tests.

There are at least four primary standards currently in use for determining whether prison conditions violate the Eighth Amendment. The four primary standards are: 1) Evolving Sense of Decency, 2) Shock to the Conscience, 3) a Balancing Test, and 4) the Totality of the Circumstances Test. These tests are often mixed and melded haphazardly within a given opinion and they often accompany one or more of a half-dozen other subsidiary standards currently in use. Professor Fair, in the article cited above, distinguishes five separate tests and has catalogued the opinions in which they are employed. His survey of district court cases concludes that the Evolving Standards of Decency Test is used in 66% of the cases, Totality of the Circumstances in 45%, the Balancing Test in 45%, Shock to the Conscience in 41%, and a Least Restrictive Means Test like that disapproved in *Bell v. Wolfish,* 441 U.S. 520 (1979), in 34% of the cases, most of which are pretrial detention cases.

We offer the following rough survey of recent circuit court cases sorted by the tests employed:

EVOLVING STANDARDS OF DECENCY

The Evolving Standards of Decency Test is, as Professor Fair documents, probably the single most popular standard for determining whether conditions

of prison confinement violate the Eighth Amendment. The test is based on dictum in the plurality opinion of Chief Justice Warren in *Trop v. Dulles, supra,* which in turn relies on *Weems v. United States, supra*:

> "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S., at 100-01.

This language does not, of course, state a standard. It points to an unarticulated and perhaps unarticulable standard of "human decency." The test, insofar as it is a standard at all, has been widely criticized as hopelessly subjective and class determinate; one man's indecency may be another's aspiration. The Evolving Standards of Decency Test has been used in the following recent federal circuit court cases: *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977); *Nadeau v. Helgemoe,* 561 F.2d 411 (1st Cir. 1977); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections,* 529 F.2d 854 (4th Cir. 1975).

SHOCK THE CONSCIENCE TEST

The Shock the Conscience Test is arguably more rigorous than the Evolving Standards of Decency Test. Although it is equally subjective, it should require conditions that actually shock a reasonable person, not a person who, because of social and economic back-

ground, is shocked by the very existence of poverty and the status of incarceration.[4] Federal courts have managed to be shocked in nearly every instance in which the question has arisen. The standard is derived from the Due Process analysis of *Rochin v. California,* 342 U.S. 165 (1951):

> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." 342 U.S., at 172.

That the Shock the Conscience Test is a coordinate of the Evolving Standards of Decency Test as established in *Trop v. Dulles* is manifested by the language with which Justice Frankfurter lays the foundation:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of

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[4] At least one federal district court, after observing that, "I discover in the cases scarcely a single beam or joist in a framework of principles within which a particular constitutional challenge to a particular prison regulation can be decided," *Morales v. Schmidt,* 340 F. Supp. 544, 548 (W.D. Wisc. 1972), expressly concluded that,

> "With respect to the intrinsic importance of the challenges, I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." *Id.,* at 548-549.

> justice of English-speaking peoples even towards those charged with the most heinous offenses.' *Malinski v. New York, supra,* 324 U.S. at 416, 417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cordozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 342 U.S., at 169.

If the "double bunking" practices outlined in *Bell v. Wolfish, supra,* do not offend the Due Process Clause, it is difficult to perceive how they can violate the Eighth Amendment under this standard, unless pure duration is the controlling consideration.

The Shock the Conscience Test has been employed in the following circuit court cases: *Nadeau v. Helgemoe, supra; Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976); *French v. Heyne,* 547 F.2d 994 (7th Cir. 1976); *Holt v. Sarver,* 442 F.2d 304 (8th Cir. 1971); *Sweet v. South Carolina Dept. of Corrections, supra.*

BALANCING TEST

Courts have, in examining the deprivations complained of by inmates as a result of confinement, balanced "the legitimate rights of the prisoner [with] the necessary concern and responsibility of the prison authorities for security and order." *Sweet v. South Carolina Dept. of Corrections, supra,* 529 F.2d, at 860.

The Balancing Test is often dovetailed with what has been called the Penological Purpose Test which requires that all punishments must be related to a legitimate penological purpose:

> "The Supreme Court recently identified three legitimate functions of a correctional system: deterrence, both specific and general; rehabilitation; and institutional security. *Pell v. Procunier,* 417 U.S. at 8222-23, 94 S. Ct. 2800. 'it is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.' *Id.* at 823, 94 S. Ct. at 2804. Therefore, when a prison policy advances one of these valid goals, the Court is required to weigh the competing interests of the prisoner and of the state in pursuing that goal. When an inmate is restricted in a manner which supports no such valid purpose, that restriction cannot stand." *Pugh v. Locke,* 406 F. Supp. 318, 328 (M.D. Ala. 1976).

Nadeau v. Helgemoe, supra, while it rejects the standard, identifies ten federal cases that have either relied on the Penological Purpose Test or have attempted to coordinate it with a more "traditional" analysis. The Balancing Test has been applied in the following circuit court cases: *Crowe v. Leeke, supra, Sweet v. South Carolina Dept. of Corrections, supra, Finney v. Arkansas Bd. of Corrections, supra.*

TOTALITY OF THE CIRCUMSTANCES

The Totality of the Circumstances Test incorporates a holistic approach and is often employed to hold

the aggregate conditions in a prison unconstitutional even though no single constituent element is, in itself, unconstitutional. The Totality of the Circumstances Test is adequately stated in *Chapman.* The test has been applied in the following cases: *Johnson v. Levine,* 588 F.2d 1378 (4th Cir. 1978); *Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977) *French v. Hayne, supra; Sweet v. South Carolina Dept. of Corrections, supra; Gates v. Collier, supra; Finney v. Arkansas Bd. of Corrections, supra.*

In addition to the more common tests, federal courts are currently developing standards around language found in earlier circuit court cases. The suggestion in *Novak v. Beto,* 453 F.2d 661, 665 (5th Cir. 1971), that the deprivation of basic elements of hygiene violates the Eighth Amendment has acquired the status of an Eighth Amendment test. *See, Costello v. Wainwright,* 525 F.2d 1239 (5th Cir. 1976); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974); *Campbell v. Beto,* 460 F.2d 765 (5th Cir. 1972). The *Novak* formulation was broadened by influential language in *Newman v. Alabama,* 449 F.2d 283 (5th Cir. 1977):

> "It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanita-

> tion, and necessary medical attention." 449 F.2d, at 286.

See also Battle v. Anderson, supra; Finney v. Arkansas Bd. of Corrections, supra. The "test" evolved again when its focus was shifted in *Battle v. Anderson, supra,* which cites a group of cases for the proposition that,

> "Courts have also evaluated quality of life in penal facilities and demanded a healthy environment with adequate sanitation, ventilation, lighting and utilities . . ." 564 F.2d, at 394.

Battle cites *Estelle v. Gamble,* 429 U.S. 97 (1976) for guidance:

> "We are guided by the fact that the United States Supreme Court has not wavered in its holding that the Eighth Amendment to the United States Constitution prohibiting the imposition of cruel and unusual punishment is, *inter alia,* intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." 564 F.2d, at 393.

It should be evident that the Eighth Amendment standards employed are extremely fluid. The standards bear little or no relation to the history of the Eighth Amendment or its language; and the resolutions in the federal courts often, as a result, merely state gestalt conclusions devoid of principled analysis. The very fluidity of the standards should indicate the

care with which they are to be applied and considerations of federalism and separation of powers should act as an astringent in that application. But the lower federal courts' inevitable incantation of the admonition of *Procunier v. Martinez, supra,* fn. 1, is invariably dissipated by the formula that constitutional deprivations, "simply cannot be countenanced, and this Court is under a duty, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights." *Pugh v. Locke, supra,* 406 F. Supp., at 328.

In the seven years since this Court acted in *Procunier v. Martinez* to protect identifiable First Amendment rights from unnecessary dilution through prison regulation, the federal courts have, with increasing frequency, acted as "front line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier v. Martinez,* 416 U.S., at 405 n. 9. When, as in this and all prison overcrowding cases, those complaints are not tied to any other constitutionally guaranteed right, prisoners have invoked the Eighth Amendment and found solace in the conscience of the Courts. As a consequence, the moral ideal embodied in the Eighth Amendment has been reduced to a jurisdictional base from which federal district courts can impose apparently unreviewable architectural and penological standards upon the states.

As a consequence of the confusion as to the appropriate standard or standards, the subjective nature of the existing standards, and the laxity with which the standards are applied, there are

> ". . . no guidelines by which state prison authorities might anticipate litigation and voluntarily conform to federal constitutional standards that are binding on the states. Mere moral outrage by a federal judge does little to provide prison officials with any basis for establishing prison policies and criteria of confinement." Robbins, Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights, 26 Kan. L. Rev. 551, 554 (1978).

This case provides an appropriate vehicle for this Court to establish a benchmark against which other prison condition cases may be measured. In *Chapman,* as in *Battle v. Anderson, supra,* the conclusion that overcrowding is cruel and unusual appears unassailable only because it is nonanalytic. While all might agree that the Black Hole of Calcutta constituted cruel and unusual punishment due to overcrowding, the question is ordinarily one of degree. But the fact that the issue involves judgments of degree does not make its resolution unreviewable. The conditions outlined in *Chapman* are simply of a different order than the conditions outlined in *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969); and the standards for determining whether an Eighth Amendment violation exists can

and ought to reflect that difference. This Court has never squarely addressed the important questions posed by this case. It should take this occasion to do so.

CONCLUSION

For the reasons outlined above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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